

ARAB MALAYSIAN CREDIT BHD

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v.

MAHATHIR ABDULLAH & ORS

HIGH COURT MALAYA, KUALA LUMPUR

B

BALIA YUSOF WAHI J

[CIVIL SUIT NO: S6-22-1028-2006]

14 FEBRUARY 2010

CONTRACT: *Breach - Solicitor's contractual duty - Breach of contractual duty to exercise due care and diligence in conduct of client's case - Duty to use due care and skill in prosecuting client's claim against debtors - Failure to serve writ, enter judgment, appear for hearing and to locate/reconstruct misplaced court file - Liability to compensate client for loss occasioned by breach of solicitor's contractual duty - Loss of client's cause of action through limitation*

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TORT: *Negligence - Duty of care - Duty owed by solicitors to client as professionals professing special skills - Duty to use reasonable care in prosecuting client's claim against debtors - Failure to serve writ, enter judgment, appear for hearing and to locate/reconstruct misplaced court file - Liability to compensate client for loss occasioned by breach of care - Loss of client's cause of action through limitation*

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LEGAL PROFESSION: *Duty of care - Duty to client - Breach of contractual duty to exercise due care and diligence in conduct of client's case - Duty owed by solicitors to client as professionals professing special skills - Breach of contractual duty or tort of negligence - Failure to serve writ, enter judgment, appear for hearing and to locate/reconstruct misplaced court file - Liability to compensate client for loss of cause of action through limitation*

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PARTNERSHIP: *Liabilities of partners - Retired partner - Liability for partnership debts or obligations incurred before retirement as partner of law firm - Partners sued by client for breach of contractual duty as solicitors or negligence - Partnership Act 1961, ss. 14, 19(2)*

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This was an action by the plaintiff/bank against the three defendants herein (partners in a law firm) for breach of contractual duty and/or negligence in their handling of the plaintiff's failed suits against its debtors in a hire purchase matter. It was contended that the defendants, practising under the said firm, were liable in failing to exercise the due care and diligence and reasonable skills expected of a professional in prosecuting the plaintiff's claims against its debtors and in obtaining judgment on behalf of the plaintiff. The

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- A plaintiff claimed that limitation had now set in on its claims as against the debtors, causing it to suffer loss. The issues that fell for determination were whether: (i) the defendants had breached their contractual duty and/or were negligent; (ii) the plaintiff's cause of action against the debtors was time barred; (iii) the plaintiff had proved loss; and (iv) the plaintiff was guilty of contributory negligence.
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Held (allowing the plaintiff's action):

- (1) In discharging their duties as advocates and solicitors, the defendants were under a contractual duty to use due care in the conduct of the cause or matter before them. The defendants had a duty to provide information as to the progress of the proceedings they conducted on behalf of the plaintiff against the debtors as well as to provide legal advice and consultation to the plaintiff who was their client. There was, therefore, no merit in the defendants' contention that they did not receive proper instructions from the plaintiff. The various documents and letters tendered showed that the plaintiff had been dissatisfied with the defendants' inaction. The defendants had, *inter alia*, failed to serve the writ on the 1st and 3rd debtors, failed to enter judgment against the 2nd debtor who did not even file a defence, failed to appear for the hearing to extend the validity of the writ, and misplaced the court file and failed to locate or reconstruct it. (para 11)
- (2) The defendants had failed in their duty to use reasonable care and skill in handling the plaintiff's claim against the debtors - as could normally be demanded of a competent and careful practitioner. The defendants were therefore liable to compensate the plaintiff for the losses occasioned by such a breach of contractual duty on their part as solicitors for the plaintiff. The plaintiff's loss would be the loss of its cause of action as against the debtors which, in turn, would equate to the amount due and owing from the debtors. (paras 12 & 13)
- (3) The defendants would also be liable in tort - independent of contract - as professionals professing special skills who gave assistance to another and who owed a duty of care to that other person who to their knowledge relied on their skills. (para 12)
- (4) The plaintiff's cause of action, having accrued on 15 May 1992 (as against the 1st debtor) and on 16 December 1992 (as against the 2nd and 3rd debtors), was time-barred. (para 14)

(5) There was no question of the plaintiff being guilty of contributory negligence or of failure to mitigate its own losses. (para 15) A

(6) By virtue of s. 14 of the Partnership Act 1961 read together with s. 19(2) thereof a retired partner of a firm does not cease to be liable for partnership debts or obligations incurred before his retirement. Thus, the 2nd defendant's plea as to his retirement from the firm on 31 December 2001 was to no avail. (para 16) B

Case(s) referred to:

Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA (**refd**) C

Kamalam Raman & Ors v. Eastern Plantation Agency (Johore) Sdn Bhd & Ors [1997] 5 CLJ 250 HC (**refd**)

KE Hilborne & Ors v. New Ching Kee [1978] 1 LNS 77 HC (**refd**)

Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd (1) [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251 FC (**refd**) D

Miranda v. Khoo Yew Boon [1967] 1 LNS 102 FC (**refd**)

Neogh Soo Oh & Ors v. G Rethinasamy [1983] 2 CLJ 218; [1983] CLJ (Rep) 663 HC (**refd**)

Legislation referred to:

Partnership Act 1961, ss. 14, 19(2), (3) E

For the plaintiff - Dato' Manpal Singh (Jf Woo with him); M/s Manjit Singh Sachdev, Mohd Radzi & Partners

For the 1st defendant - SN Seelan; M/s Athi Seelan Mahathir & Partners

For the 2nd defendant - Felicia Ho (Jane Pragasam with her); M/s Ho Noecker & Pragasam F

For the 3rd defendant - Jason Wee (Andy Tan with him); M/s Tommy Thomas

Reported by Gan Peng Chiang

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JUDGMENT

Balia Yusof Wahi J:

Facts

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[1] Way back in 1992, the plaintiff engaged Messrs Shahrom Shah Chin & Mahathir to handle a case where the plaintiff was pursuing an action against three debtors in respect of a hire purchase transaction. A writ of summons was subsequently filed by the said firm *vide* Civil Suit No. D4-22-89-1993 and subsequently replaced by D4-22-314-1997. Messrs Shahrom Shah Chin & Mahathir however failed to obtain any judgment against the I

- A defendants in any of the said two suits and the matter was subsequently handed over to another firm of solicitors by which time according to the plaintiff the action against the debtors was time-barred. The three defendants in the instant case are partners of the said legal firm of Messrs Shahrom Shah Chin & Mahathir.
- B The plaintiff's claim against them is for the sum of RM263,204.78 being the amount due to the plaintiff in respect of the failed civil suits filed by the defendants against the debtors.

The Plaintiff's Case

- C [2] Upon hearing the witnesses for the plaintiff it is apparent that the plaintiff had a lot of problems dealing with the firm of Messrs Shahrom Shah Chin & Mahathir which subsequently changed its name to Messrs SL Chin & Mahathir with the retirement of the second defendant from the firm. The main
- D complaint of the plaintiff is that there was inaction on the part of the defendants. Numerous reminder letters had to be sent to the defendants before a reply was given and the matter attended to.

- E [3] I have taken the liberty of summarising the plaintiff's evidence against the defendant in a chronological order. The chronology of events that took place subsequent to the appointment of Messrs Shahrum Shah Chin & Mahathir (hereafter referred to as SSCM) are as follows:

- F 1. Letter dated 8 February 1993 from SSCM informing plaintiff that a writ has been filed (exh. P16).
2. Amendment of writ hearing on 12 July 1993.
3. Amended writ forwarded to the defendants' agent in Terengganu for service on 29 January 1994 (exh. P23).
- G 4. Order for extension of writ obtained on 4 April 1994 and a copy of the same sent to the plaintiff.
5. Writ could not be served personally. A fresh writ was filed in 1997.
- H 6. On 26 April 1997 the plaintiff was advised that a fresh writ has been filed and pending extraction (exh. P31).
- I 7. Fresh writ extracted on 14 May 1997 and sent to Terengganu for service (exh. P33).

8. On 22 October 1997 the plaintiff was informed that writ could not be served on the first and third defendants/debtors and an application for substituted service was being prepared. Service however was effected on the second debtor/defendant. A
9. Application for substituted service was fixed for hearing on 2 January 1998. However the application was struck off. B
10. On 20 January 1998 application to reinstate the substituted service application was filed and fixed for hearing on 25 February 1998. The application to reinstate the substituted service application was granted on 25 February 1998. C
11. The writ expires on 25 April 1998.
12. On 28 April 1998 application to extend the writ was filed and fixed for hearing on 10 September 1998 (application in encl. 9). D
13. On 10 September 1998 encl. 9 was struck off because of non-appearance/attendance of counsel (exhs. P40 & P41).
14. On 7 October 1998 application to reinstate encl. 9 was filed and fixed for hearing on 1 December 1998 (application in encl. 11) (exh. P42). E
15. On 1 December 1998 encl. 11 was dismissed.
16. Court's file went missing and no further development took place. F
17. *Via* letter dated 22 June 2000 the plaintiff instructed SSCM to withdraw the suit and file afresh (exh. P52).
18. SSCM advised plaintiff that it was not possible to withdraw the suit because the writ has already been served on the second defendant/debtor. SSCM informs plaintiff they wanted to continue efforts to locate the missing court file. G
19. In 2001 SSCM changed its name to SL: Chin & Mahathir (SLCM).
20. On 9 July 2002 the plaintiff instructed SLCM to transfer the files to Messrs Sivananthan (exh. P59). H
21. 3 March 2003 SLCM issued final bill to the plaintiff (exh. P60). I

- A 22. 30 June 2003 SLCM forwarded all papers/files to Messrs Sivananthan. (exh. P63).
23. 13 October 2003 Messrs Sivananthan gave an opinion on the writ (exh. P43).
- B 24. Letter dated 20 April 2006 plaintiff instructed Messrs Manjit Singh Sidhu to take action against the defendants in this case (exh. P44).

- C [4] The plaintiff claims that the defendants practising under the firm of Messrs Shahrom Shah Chin & Mahathir had been negligent in failing to exercise due care, reasonable skills and diligence expected of a professional in presenting the plaintiff's claims against the debtors and obtaining judgment on behalf of the plaintiff despite having filed two legal suits against the debtors. As a result, the plaintiff has suffered losses arising from the fact that limitation has set in with regard to the plaintiff's claims against the debtors. The plaintiff contends, as a result of this, it is unable to claim the debt due and owing by the debtors.
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The Defendants' Case

- E [5] The defendants contend that all reasonable steps to prosecute the plaintiff's claim against the debtors have been taken. The plaintiff has all along been kept informed of the status of the case. The relationship between the plaintiff and the defendants has been rather informal and communications were made through telephone calls and not necessarily in writing. It is further contended that the plaintiff is guilty of contributory negligence. The plaintiff being conversant with litigation process should have taken immediate steps to transfer the case to another firm if they are so dissatisfied with the defendants' firm. Thus the plaintiff has failed to mitigate its losses if any. The plaintiff ought to have taken such other steps as to repossess the goods from the debtors. The defendants further plead that they faced the problem of the missing court files which hampered their action to pursue the matter.
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- H [6] The second defendant, while admitting there is duty of care owed to the plaintiff, contends that he is not liable because he has retired from the firm on 31 December 2001. He further claims the defendants have not been given proper instructions and the time line to act by the plaintiff. No instruction was given to enter judgment and when the files were transferred to Messrs Sivananthan, the defendants' work were hampered although they are willing and able to pursue the matter further. The first debtor has
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been adjudged a bankrupt and since a proof of debt has been filed by the plaintiff there is therefore no necessity to pursue the plaintiff's claim against him in the suit. As for the second debtor, who has been served with the writ, the plaintiff can still obtain judgment against him but has chosen not to do so.

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[7] The first defendant insisted that the plaintiff never gave any instruction after the second debtor has entered appearance and certainly there was no instruction to enter judgment against the same. There was also no instruction to appeal against the decision on the dismissal of encl. 11 or to file a fresh application for extension of the 1997 suit.

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[8] On the issue of limitation, the defendants contend that the action of the plaintiff against the debtors is not time-barred.

Issues

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[9] The issues for determination by the court are as follows:

- 1) Whether there is negligence on the part of the defendants.
- 2) Whether the plaintiff's action against the debtors is time barred.
- 3) Whether the plaintiff has suffered losses.
- 4) Whether there is contributory negligence on the part of the plaintiff.

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Findings

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[10] If it is trite that to sustain an action for negligence, the plaintiff must prove that there is duty of care, there was a breach of that duty of care and in consequence of that breach, damage is suffered by the plaintiff (See: *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585).

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[11] In discharging their duties as advocates and solicitors, the defendants are under a contractual duty to use care and this extends to the conduct of the cause or matter before them. (See *Miranda v. Khoo Yew Boon* [1967] 1 LNS 102). It was incumbent on the part of the defendants not only to provide information as to the progress of the legal proceedings conducted on behalf of the plaintiff against the debtors but also to provide legal advice and consultation with the plaintiff as their client. The Federal Court in *Messrs. Yong & Co v. Wee Hood Teck Development Corp Ltd (1)* [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251 held that while the duty of the

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- A solicitor is directly related to the confines of the retainer, it is the incident of that contractual duty that he has to consult his client on all questions of doubt which do not fall within the express or implied direction left to him. It is also his duty to keep his client informed to such extent as may be necessary according to the same criteria. (See also: *Kamalam Raman & Ors v. Eastern Plantation Agency (Johore) Sdn Bhd & Ors* [1997] 5 CLJ 250)

- [12] In my considered view, the defendants' contention that they have no instruction from the plaintiff has no merit whatsoever. The plaintiff had at all times relied on the skill and diligence of the defendants in their professional capacity in the conduct of the proceedings against the debtors. The defendants' argument can easily be dismissed with the evidence of PW2 and PW3 in relation to the various letters sent to the defendants such as shown in exhs. P45, P46, P47, P48 and P49 which were not responded to by the defendants. Exhibits P49 and P51 expressed the plaintiff's dissatisfaction while by exh. P52 the defendants were told to withdraw the 1997 suit and file afresh on 22 June 2000. In fact, way back in 1995, PW6 by a letter dated 5 May 1995 (exh. P26) has also expressed the plaintiff's dissatisfaction with the way the matter was being handled by the defendants. This was in respect of the 1993 suit. The defendants has failed to serve the writ on the 1st and 3rd debtors for the 1997 suit and there is no evidence of any attempts made by the defendants to do so except for sending it to their agent in Terengganu. There was no judgment entered against the 2nd debtor who has been served with the writ despite the fact that no defence was filed after the filing of the memorandum of appearance on behalf of the 2nd debtor by Messrs Raja Azhar & Hussain Safri. Then again there were encls. 9 and 11. The defendants has failed to appear for the hearing of encl. 9 on 10 September 1998 to extend the validity of the writ. The writ was not extended. The defendant, then filed encl. 11 to reinstate encl. 9 but this was dismissed by the court on 1 December 1998. The plaintiff was never informed about the dismissal of encl. 11 and the court file went missing immediately after this. What did the defendants do after the dismissal of encl. 11? Did they advise the plaintiff? Did they get further instructions from the plaintiff whether to file an appeal or otherwise? The defendants claimed that the firm could not continue to prosecute the plaintiff's claim against the debtors. A close scrutiny of the chronology of events clearly show the tardiness of the defendants. I fully agree with the plaintiff's counsel's submissions that the defendants had not exercised reasonable diligence to locate the court file and/or reconstruct the

court file to ensure that it was able to prosecute the plaintiff's claim against the debtors. DW1 during cross-examination admitted that the firm of Shahrum Shah Chin & Mahathir sent no letters to the court regarding the missing file. There is no evidence at all of what steps were taken by the defendants to address the matter. On the totality of the evidence, I have no hesitation in finding that the defendants had failed in their duties to use reasonable care and skill in handling the plaintiff's claim against the debtors demanded of a normally competent and careful practitioners. The defendants must be held liable to compensate the plaintiff for the loss by such breach of contractual duty as solicitors for the plaintiff. The defendants would also be liable in tort quite independent of contract, as a professional professing special skills who gives assistance to another and owed a duty of care to that other person who to their knowledge relied on their skill. (See: *Neogh Soo Oh & Ors v. G Rethinasamy* [1983] 2 CLJ 218; [1983] CLJ (Rep) 663.

[13] As a result of the defendants' failure to prosecute the plaintiff's case against the debtors, the plaintiff has therefore been deprived of its cause of action against the debtors. That, in my view is the loss suffered by the plaintiff which would be claimable against the defendants. The plaintiff is now claiming from the defendants the very sum owed by the debtors to the plaintiff. In *KE Hilborne & Ors v. New Ching Kee* [1978] 1 LNS 77, the Singapore court of appeal held that a plaintiff who had been deprived of his cause of action by failure to serve the writ in time, was the same as that of a plaintiff who had been deprived of his cause of action for want of prosecution and, therefore a client who had been deprived of his cause of action by the delay of his solicitors was entitled to recover damages from them.

[14] On the issue of limitation, exh. P43 is a letter from Messrs Sivananthan dated 13 October 2003 informing the plaintiff that the plaintiff's legal proceedings against the debtors is time-barred. The plaintiff's cause of action against the 1st debtor has accrued since 15 May 1992 while against the 2nd and 3rd debtors the plaintiff had through solicitors' letter dated 16 December 1992 issued a letter of demand and on the premise of that letter, Messrs Sivananthan was of the opinion that limitation has also set in against the 2nd and 3rd debtors. I am in agreement with the views expressed by Messrs Sivananthan in the said letter in exh. P43 and hold that the plaintiff's action against the debtors is time-barred by the time the files and the cause papers were transferred to Messrs Sivananthan. It is also pertinent to note that the plaintiff did ask

- A the defendants to file a fresh suit by a letter dated 22 June 2000 (exh. P52), but the defendants did nothing. This was after a lapse of time after the court file went missing immediately after the dismissal of encl. 11 on 1 December 1998. The defendants had also not advised the plaintiff on the position of the 2nd debtor who had entered his appearance as to whether judgment ought or could be obtained against him. Nothing was done right up to the time when the cause papers were transferred to Messrs Sivananthan on 30 June 2003 (exh. P63).

- C [15] The defendants contend that it was incumbent on the plaintiff's new solicitors to file a fresh application to extend the validity of the writ of summons in the 1997 suit. I agree with the learned counsel for the plaintiff that it would be, to say the least, preposterous for the defendants to suggest that a writ of summons that has expired in April 1998 would be renewed five years later in 2003 considering the facts and circumstances of this case. Why didn't the defendants themselves do it much earlier? It is not open to the defendants to now say that the plaintiff is guilty of contributory negligence and have failed to mitigate its losses by so failing to do and/or file a fresh action through the new solicitors. I do not find any merit in the defendants' contention of contributory negligence on the part of the plaintiff.

- F [16] All the three defendants are sued as partners in the legal firm of Messrs Shahrum Shah Chin & Mahathir. The liability of partners are clearly spelt out under s. 14 of the Partnership Act 1961 and as to a retiring partner, s. 19(2) of the same Act stipulates that a partner who retires from the firm does not cease to be liable for partnership debts or obligations incurred before his retirement. The second defendant's plea of his retirement from the firm on 31 December 2001 is therefore of no avail. On the facts and circumstances of the case, I am also of the view that the second defendant's reliance on the provisions of s. 19(3) of the Partnership Act 1961 is misplaced.

- H [17] In conclusion, the plaintiff's claim against the defendants is hereby allowed as per items (a) (b) (c) and (d) of para. 19 of the statement of claim.